

- Strecher VJ, Kreuter M, Den Boer DJ, Kobrin S, Hoppers HJ, Skinner CS. The effects of computer-tailored smoking cessation messages in family practice settings. *Journal of Family Practice* 1994;39(3):262-70.
- Strecher VJ, O'Malley MS, Villagra VG, Campbell EE, Gonzalez JJ, Irons TG, Kenney RD, Turner RC, Rogers CS, Lyles MF, White ST, Sanchez CJ, Stritter FT, Fletcher SW. Can residents be trained to counsel patients about quitting smoking? Results from a randomized trial. *Journal of General Internal Medicine* 1991;6(1):9-17.
- Sutherland G, Stapleton JA, Russell MAH, Jarvis MJ, Hajek P, Belcher M, Feyerabend C. Randomised controlled trial of nasal nicotine spray in smoking cessation. *Lancet* 1992;340(8815):324-9.
- Swan GE, Ward MM, Carmelli D, Jack LM. Differential rates of relapse in subgroups of male and female smokers. *Journal of Clinical Epidemiology* 1993;46(9):1041-53.
- Swartz SH, Ellsworth AJ, Curry SJ, Boyko EJ. Community patterns of transdermal nicotine use and provider counseling. *Journal of General Internal Medicine* 1995;10(12):656-62.
- Tager IB. Health effects of involuntary smoking in the workplace. *New York State Journal of Medicine* 1989;89(1):27-31.
- Tang JL, Law M, Wald N. How effective is nicotine replacement therapy in helping people to stop smoking? *British Medical Journal* 1994;308(6920):21-6.
- Tate JC, Schmitz JM. A proposed revision of the Fagerström Tolerance Questionnaire. *Addictive Behaviors* 1993;18(2):135-43.
- Taylor CB, Houston-Miller N, Killen JD, DeBusk RF. Smoking cessation after acute myocardial infarction: effects of a nurse-managed intervention. *Annals of Internal Medicine* 1990;113(2):118-23.
- Ter Riet G, Kleijnen J, Knipschild P. A meta-analysis of studies into the effect of acupuncture on addiction. *British Journal of General Practice* 1990;40(338):379-82.
- Thomas RM, Larsen MD. *Smoking Prevalence, Beliefs, and Activities by Gender and Other Demographic Indicators*. Rockville (MD): Gallup Organization, 1993.
- Tiffany ST, Hakenewerth DM. The production of smoking urges through an imagery manipulation: psychophysiological and verbal manifestations. *Addictive Behaviors* 1991;16(6):389-400.
- Tiffany ST, Martin EM, Baker TB. Treatments for cigarette smoking: an evaluation of the contributions of aversion and counseling procedures. *Behaviour Research and Therapy* 1986;24(4):437-52.
- Tomar SL, Husten CG, Manley MW. Do dentists and physicians advise tobacco users to quit? *Journal of the American Dental Association* 1996;127(2):259-65.
- Tomar SL, Winn DM, Swango GA, Giovino GA, Kleinman DV. Oral mucosal smokeless tobacco lesions among adolescents in the United States. *Journal of Dental Research* 1997;76(6):1277-86.
- Tønnesen P, Fryd V, Hansen M, Helsted J, Gunnarsen AB, Forchhammer H, Stockner M. Effect of nicotine chewing gum in combination with group counseling on the cessation of smoking. *New England Journal of Medicine* 1988a;318(1):15-8.
- Tønnesen P, Fryd V, Hansen M, Helsted J, Gunnarsen AB, Forchhammer H, Stockner M. Two and four mg nicotine chewing gum and group counselling in smoking cessation: an open, randomized, controlled trial with a 22 month follow-up. *Addictive Behaviors* 1988b;13(1):17-27.
- Tønnesen P, Nørregaard J, Mikkelsen K, Jørgensen S, Nilsson F. A double-blind trial of a nicotine inhaler for smoking cessation. *Journal of the American Medical Association* 1993;269(10):1268-71.
- Tønnesen P, Nørregaard J, Simonsen K, Säwe U. A double-blind trial of a 16-hour transdermal nicotine patch in smoking cessation. *New England Journal of Medicine* 1991;325(5):311-5.
- Transdermal Nicotine Study Group. Transdermal nicotine for smoking cessation: six-month results from two multicenter controlled clinical trials. *Journal of the American Medical Association* 1991;266(22):3133-8.
- Tsevat J. Impact and cost-effectiveness of smoking interventions. *American Journal of Medicine* 1992;93(Suppl 1A):43S-47S.

Tyndale RF, Pianezza ML, Sellers EM. A common genetic defect in nicotine metabolism decreases risk for dependence and lowers cigarette consumption. *Nicotine and Tobacco Research* 1999;1(Suppl 2):S63-S67.

US Department of Health and Human Services. *The Health Consequences of Involuntary Smoking. A Report of the Surgeon General*. Rockville (MD): US Department of Health and Human Services, Public Health Service, Centers for Disease Control, Center for Health Promotion and Education, Office on Smoking and Health, 1986. DHHS Publication No. (CDC) 87-8398.

US Department of Health and Human Services. *The Health Consequences of Smoking: Nicotine Addiction. A Report of the Surgeon General*. Rockville (MD): US Department of Health and Human Services, Public Health Service, Centers for Disease Control, Center for Health Promotion and Education, Office on Smoking and Health, 1988. DHHS Publication No. (CDC) 88-8406.

US Department of Health and Human Services. *Reducing the Health Consequences of Smoking: 25 Years of Progress. A Report of the Surgeon General*. Atlanta: US Department of Health and Human Services, Public Health Service, Centers for Disease Control, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 1989. DHHS Publication No. (CDC) 89-8411.

US Department of Health and Human Services. *Healthy People 2000: National Health Promotion and Disease Prevention Objectives*. Washington: US Department of Health and Human Services, Public Health Service, 1991. DHHS Publication No. (PHS) 91-50212.

US Department of Health and Human Services. *Preventing Tobacco Use Among Young People: A Report of the Surgeon General*. Atlanta: US Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 1994.

US Department of Health and Human Services. *Tobacco Use Among U.S. Racial/Ethnic Minority Groups—African Americans, American Indians and Alaska Natives, Asian Americans and Pacific Islanders, and Hispanics: A Report of the Surgeon General*. Atlanta: US Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 1998.

US Department of Health and Human Services. *Healthy People 2010* (Conference edition, in two volumes). Washington: US Department of Health and Human Services, 2000.

Velicer WF, Prochaska JO, Bellis JM, DiClemente CC, Rossi JS, Fava JL, Steiger JH. An expert system intervention for smoking cessation. *Addictive Behaviors* 1993;18(3):269-90.

Wack JT, Rodin J. Smoking and its effects on body weight and the systems of caloric regulation. *American Journal of Clinical Nutrition* 1982;35(2):366-80.

Wagner EH, Curry SJ, Grothaus L, Saunders KW, McBride CM. The impact of smoking and quitting on health care use. *Archives of Internal Medicine* 1995;155:1789-95.

Wagner EH, Schoenbach VJ, Orleans CT, Grothaus LC, Saunders KW, Curry S, Pearson DC. Participation in a smoking cessation program: a population-based perspective. *American Journal of Preventive Medicine* 1990;6(5):258-66.

Wei H, Young D. Effect of clonidine on cigarette cessation and in the alleviation of withdrawal symptoms. *British Journal of Addiction* 1988;83(10):1221-6.

Weissfeld JL, Holloway JL. Treatment for cigarette smoking in a Department of Veterans Affairs outpatient clinic. *Archives of Internal Medicine* 1991;151(5):973-7.

Wells KB, Ware JE Jr, Lewis CE. Physicians' attitudes in counseling patients about smoking. *Medical Care* 1984;22(4):360-5.

West R. The "nicotine replacement paradox" in smoking cessation: how does nicotine gum really work? [editorial] *British Journal of Addiction* 1992;87(2):165-7.

West RJ. Psychology and pharmacology in cigarette withdrawal. *Journal of Psychosomatic Research* 1984;28(5):379-86.

West RJ, Hajek P, Belcher M. Severity of withdrawal symptoms as a predictor of outcome of an attempt to quit smoking. *Psychological Medicine* 1989;19(4):981-5.

West RJ, Jarvis MJ, Russell MAH, Carruthers ME, Feyerabend C. Effect of nicotine replacement on the cigarette withdrawal syndrome. *British Journal of Addiction* 1984a;79(2):215-9.

West RJ, Russell MA, Jarvis MJ, Feyerabend C. Does switching to an ultra-low nicotine cigarette induce nicotine withdrawal effects? *Psychopharmacology* 1984b; 84(1):120-3.

Westman EC, Levin ED, Rose JE. The nicotine patch in smoking cessation: a randomized trial with telephone counseling. *Archives of Internal Medicine* 1993;153 (16):1917-23.

Wetter DW, Kenford SL, Smith SS, Fiore MC, Jorenby DE, Baker TB. Gender differences in smoking cessation. *Journal of Consulting and Clinical Psychology* 1999; 67(4):555-62.

Whitlock EP, Vogt TM, Hollis JF, Lichtenstein E. Does gender affect response to a brief clinic-based smoking intervention? *American Journal of Preventive Medicine* 1997;13(3):159-66.

Wiggins JS. *Personality and Prediction: Principles of Personality Assessment*. Malabar (FL): Robert E. Krieger Publishing Company, 1988.

Williamson DF, Madans J, Anda RF, Kleinman JC, Giovino GA, Byers T. Smoking cessation and severity of weight gain in a national cohort. *New England Journal of Medicine* 1991;324(11):739-45.

Wilson DM, Taylor DW, Gilbert JR, Best JA, Lindsay EA, Willms DG, Singer J. A randomized trial of a family physician intervention for smoking cessation. *Journal of the American Medical Association* 1988;260(11): 1570-4.

Windsor RA, Cutter G, Morris J, Reese Y, Manzella B, Bartlett EE, Samuelson C, Spanos D. The effectiveness of smoking cessation methods for smokers in public health maternity clinics: a randomized trial. *American Journal of Public Health* 1985;75(12):1389-92.

Windsor RA, Lowe JB, Perkins LL, Smith-Yoder D, Artz L, Crawford M, Amburgy K, Boyd NR Jr. Health education for pregnant smokers: its behavioral impact and cost benefit. *American Journal of Public Health* 1993; 83(2):201-6.

Windsor RA, Warner KE, Cutter GR. A cost-effectiveness analysis of self-help smoking cessation methods for pregnant women. *Public Health Reports* 1988;103(1):83-8.

Working Group for the Study of Transdermal Nicotine in Patients with Coronary Artery Disease. Nicotine replacement therapy for patients with coronary artery disease. *Archives of Internal Medicine* 1994;154(9):989-95.

Zelman DC, Brandon TH, Jorenby DE, Baker TB. Measures of affect and nicotine dependence predict differential response to smoking cessation treatments. *Journal of Consulting and Clinical Psychology* 1992;60(6): 943-52.

Zhu S-H, Melcer T, Sun J, Rosbrook B, Pierce JP. Smoking cessation with and without assistance: a population-based analysis. *American Journal of Preventive Medicine* 2000;18(4):305-11.

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Introduction

Efforts to regulate the use of tobacco date back to its introduction to European colonists of North America (see Chapter 2). As noted, these early movements to restrict tobacco use were motivated less by health concerns than by complex political, economic, and social factors. With the appearance in the 1950s of substantial scientific evidence on specific health risks of smoking, and with subsequent dissemination of that information in the 1960s, general support for a government regulatory response emerged.

As noted in Chapter 1, such regulatory activities do not necessarily fit the traditional concept of “intervention,” but their effect is to change the way people use tobacco. Because advertising and promotion are perhaps the chief social force for continued tobacco use, their regulation—or the failure to regulate them—can have substantial effects on smoking prevalence. The manner in which the product is manufactured, packaged, and distributed can similarly influence people’s decision to smoke. Regulation of smoking in public places provides an opportunity to reduce the quantity of tobacco used, the prevalence of smoking, and the exposure of nonsmokers to environmental tobacco smoke. The regulation of minors’ access to cigarettes has considerable potential for postponing or preventing the uptake of smoking, thereby making a long-term impact on the smoking epidemic. Finally, personal litigation and the tort system can influence the policies and practices of the tobacco industry and can have an impact on social perceptions of smoking.

Thus, if a broad definition of intervention can be entertained, each of these regulatory processes can be assessed for the nature of its influence on the use of tobacco. Unlike assessments of more traditional interventions (see Chapters 3 and 4), evaluation of regulatory processes must invoke a different set of measurement tools that are less quantitative but not necessarily less compelling (see Chapter 1).

Several key developments in the mid-to-late 1990s have propelled tobacco regulation in new directions and into new forums. Three key events have catalyzed these changes. They are discussed briefly in the next sections and in greater detail later in this chapter in “Further Regulatory Steps” and “Litigation Approaches.”

Food and Drug Administration (FDA) Regulations

First, on August 28, 1996, after receiving public comment on a proposed rule, the FDA issued final regulations restricting the sale, distribution, advertising, and promotion of cigarettes and smokeless tobacco (*Federal Register* 1996). Several tobacco companies, retailers, and advertisers sued the FDA to block the implementation of the regulations, arguing that the agency lacked the jurisdiction or authority to regulate these products and that the proposed advertising restrictions violated the First Amendment of the United States Constitution (*Coyne Beahm, Inc. v. Food and Drug Administration*, No. 2:95CV00591 [N.C. Aug. 10, 1995], cited in 10.5 *Tobacco Products Litigation Reporter* [TPLR] 3.379 [1995]).

On April 25, 1997, the federal district court in Greensboro, North Carolina, ruled that the FDA had the authority to regulate cigarettes and smokeless tobacco products, as drug delivery devices, under the Federal Food, Drug, and Cosmetic Act (*Coyne Beahm, Inc. v. U.S. Food & Drug Administration*, 966 F. Supp. 1374 [M.D.N.C. 1997]). The court upheld all of the FDA’s 1996 restrictions involving youth access to tobacco products and regulating product labeling. However, the court “stayed,” or temporarily blocked, implementation of most of these provisions. The only FDA regulations that escaped this stay were the prohibition on sales of cigarettes and smokeless tobacco to minors and the requirement that retailers check photo identification of customers who appear to be under 27 years of age. These provisions went into effect on February 28, 1997. The age and identification provisions remained in force until the Supreme Court’s March 21, 2000, decision.

Most notably, the court invalidated the FDA’s restrictions on the advertising and promotion of cigarettes and smokeless tobacco. Both sides in the FDA case appealed the decision to the Fourth Circuit of the United States Court of Appeals in Richmond, Virginia. A three-member panel of the court overturned the lower court’s decision and ruled that the FDA lacked the authority to regulate tobacco products. The full Fourth Circuit Court of Appeals declined to review

this reversal. The government petitioned the United States Supreme Court for review, and the Supreme Court accepted the case in April 1999. Oral argument was held December 1999, and the Court, in a 5 to 4 decision, upheld the Fourth Circuit's decision on March 21, 2000. The FDA continued to enforce the age and photo identification provisions while the case was appealed to the United States Supreme Court. On March 21, 2000, the Supreme Court ruled that although premature deaths from tobacco use present "one of the most troubling health problems facing our nation today" (*Food and Drug Administration v. Brown & Williamson*, 529 U.S. ____ [2000], 120 S. Ct. 1291), the FDA lacks the authority to issue and enforce its tobacco regulations.

These developments, central to most of the regulatory efforts covered in this chapter, are discussed in detail in the major section "Product Regulation," later in this chapter.

Initial Attempts at Multistate Settlement and Federal Legislation

Second, on June 20, 1997, a group of 41 state attorneys general presented a tobacco settlement proposal to the American public (*Tobacco Products Litigation Reporter* 1997a; see "Legislative Developments" and "Master Settlement Agreement," later in this chapter). In essence, the proposal was intended to settle all pending lawsuits against the tobacco industry brought by states and other governmental entities as well as all pending class action lawsuits. Although the settlement did not include 9 of the 50 states, its scope was inherently national: to enact its stipulated regulations of the tobacco industry, the settlement presumed the passage of congressional legislation that would necessarily affect the legal rights of all Americans. The settlement included provisions for FDA authority, new warning labels, advertising restrictions, youth access prohibitions, rules to reduce public exposure to environmental tobacco smoke, and a provision designed to provide financial incentives for tobacco manufacturers to reduce sales to underaged consumers.

Despite its intuitive appeal—that the slow, and largely unsuccessful, course of change possible through individual lawsuits would be retired for a sweeping, national, unified policy that dealt with the tobacco problem—the settlement raised concerns from the start. Public health advocates recognized that given the settlement's national scope, it was taking on the role of being the chief public health policy tool for reducing tobacco use. These critics feared that the

settlement (and moreover the legislation it presumed) would fail in this role. In particular, by limiting future lawsuits against the tobacco industry, the settlement might in the end benefit the industry more than the public.

A number of bills filed in Congress in 1997 and 1998 intended to codify the terms of the proposed national settlement. One of the bills, S. 1415 (National Tobacco Policy and Youth Smoking Reduction Act, 105th Cong., 2nd Sess., S. 1415, *Congressional Record*, 144:S5034–S5084), which ultimately departed from the settlement proposal in a number of areas, was debated on the Senate floor for several weeks. It was vehemently opposed by the tobacco industry and rejected by the Senate almost one year to the day after the attorneys general announced the proposed national settlement. The regulatory implications of the national settlement proposal are discussed together with the FDA rules, primarily in the "Product Regulation" section of this chapter.

Ultimately, this activity served as prologue to a Master Settlement Agreement that was negotiated in November 1998. On November 23, 1998, the agreement was reached between state attorneys general and major U.S. tobacco companies to settle pending and prospective lawsuits by states to recover Medicaid expenditures incurred as a result of tobacco use. Forty-six states signed the agreement, pending the required ratification in state courts (four states settled separate, individual lawsuits with the industry). The agreement requires tobacco companies to pay \$246 billion to states over 25 years and to adhere to specified restrictions on tobacco advertising and promotion. Some provisions are also made for improved disclosure of tobacco industry documents released in litigation. A separate, parallel agreement with the United States Tobacco Company was negotiated for smokeless tobacco products.

Public and Private Litigation

Third, throughout 1997 and 1998, while federal legislation was being filed and debated, the states of Mississippi, Florida, Texas, and Minnesota settled their lawsuits against the tobacco industry. Besides producing sizable settlement funds for the individual states, these settlements (in all but Mississippi) feature provisions akin to public health regulations. For example, the Florida settlement (*Florida v. American Tobacco Co.*, Civil Action No. 95-1466 AH, secs. II.A.1 and II.A.2 [Fla., Palm Beach Cty. Aug. 25, 1997]) was the first to incorporate a ban on outdoor advertising and to call for statewide restrictions on vending machines. The

Minnesota settlement (*Minnesota v. Philip Morris Inc.*, No. C1-94-8565 [Minn., Ramsey Cty. May 8, 1998], *cited in* 13.2 TPLR 3.39 [1998]), which followed a trial and the release of thousands of incriminating internal documents from the tobacco industry, contains an even wider array of public health restrictions, including a ban on promotional items and a national prohibition on commercial placement of tobacco products in movies.

Settlements of other private suits against the industry in the late 1990s have also resulted in important regulatory measures. For example, in a class action lawsuit alleging that flight attendants were injured by exposure to environmental tobacco smoke (*Broin v. Philip Morris Inc.*, No. 91-49738 CA [22] [Fla., Dade Cty. Oct. 9, 1997], *cited in* 12.6 TPLR 3.397 [1997]), the tobacco industry agreed to support legislation banning smoking on all airlines departing from or landing in the United States. In a California case, *R.J. Reynolds*

Tobacco Company agreed to accept advertising restrictions and to fund counteradvertising programs for teens. The latter provision was based on a claim that the company was violating the California consumer protection law by using their Joe Camel advertising campaign to target minors (*Mangini v. R.J. Reynolds Tobacco Co.*, No. 939359 [Calif. Sept. 8, 1997], *cited in* 12.5 TPLR 3.349 [1997]).

As of September 1998, these nonnational litigations against the tobacco industry had had a greater and more immediate impact on tobacco regulation than the delayed FDA rules, proposed national settlement, and defeated federal legislation. Regulation through litigation is a new tool for reducing tobacco use. Specific regulatory measures contained in these smaller-scope settlements are discussed in relevant sections of this chapter.

Advertising and Promotion

Introduction

Industries use various marketing tools and strategies to influence consumer preference, thereby increasing market share and attracting new consumers. The tobacco industry is among the most intense in its efforts; among U.S. manufacturers, only the automobile industry markets its products more heavily (Centers for Disease Control [CDC] 1990a). It may be assumed that cigarette manufacturers, like other industrial entities, direct their money and marketing efforts in ways that will reach consumers they believe are most likely to purchase their products. The ensuing discussion focuses on direct product marketing and excludes other promotional and public relations efforts that are not product specific.

The potential influence of cigarette advertising and promotion on smoking prevalence has been a subject of concern and debate for many years (U.S. Department of Health and Human Services [USDHHS] 1994).¹ Much of the concern has focused on whether consumers know about the adverse health effects of smoking and can make informed choices; whether children and adolescents are exposed to and are affected by tobacco advertising and promotion; and whether tobacco companies inappropriately target

advertising and promotion to specific consumer groups. A contentious debate has persisted about whether marketing induces demand and what the appropriate role of government is in protecting the consumer. Although some of these issues are not fully settled, they provide the background for considering the reduction of smoking through regulating cigarette advertising, promotion, product availability, and product presentation.

In May 1981, a Federal Trade Commission (FTC) staff report (see "A Midcourse Assessment," later in this chapter) concluded that consumer knowledge about the health effects of cigarette smoking was generally inadequate (Myers et al. 1981). Since then, adult smoking prevalence has declined substantially (from 33.5 percent in 1980 [Giovino et al. 1994] to 24.7 percent in 1995 [CDC 1997a]), and the general population's knowledge about the adverse health effects of tobacco use has improved (in recent years, 80–90 percent of

¹ In the following discussion, *advertising* refers to company-funded advertisements that appear in paid media (e.g., broadcasts, magazines, newspapers, outdoor advertising, and transit advertising), whereas *promotion* includes all company-sponsored nonmedia activity (e.g., direct-mail promotion, allowances, coupons, premiums, point-of-purchase displays, and entertainment sponsorships).

the general population has known that smoking is a health hazard [USDHHS 1989, 1998b]). During the same period, revenue devoted to advertising and promotion by the tobacco companies has increased from \$1.24 billion in 1980 to a high of \$6.03 billion in 1993 (FTC 1999) and \$5.10 billion in 1996 (FTC 1999). Tobacco companies spent \$5.66 billion on advertising and promotion in 1997 (FTC 1999). The relationship among these three events is not straightforward, and considerable ancillary information is needed for proper interpretation. In particular, the effects that both knowledge and advertising and promotion have on smoking prevalence are complex. For example, the increase in smoking uptake among women beginning in 1967 was associated with the marketing of specific cigarette brands for women (Pierce et al. 1994a). Similarly, an increase in smoking initiation among adolescents during 1985–1989 has been ecologically associated with considerable increases in promotion expenditures, as exemplified by the Joe Camel campaign (see “A Critical Example: Joe Camel,” later in this chapter) (CDC 1995b). Regardless of how these associations are interpreted, the actions of the tobacco industry bespeak the industry’s belief in corporate benefit from a major investment in advertising and promotion—an investment that may be interpreted as even exceeding an economically optimal level (see Chapter 6).

The tobacco industry has argued that its main purpose in advertising is to maintain brand loyalty and to capture a greater market share of current smokers (USDHHS 1994). Intensive review of the available data, however, suggests a positive correlation between level of advertising and overall tobacco consumption—that is, as advertising funds increase, the amount of tobacco products purchased by consumers also increases (USDHHS 1989, 1994; Smee 1992; Pierce and Gilpin 1995; also see Chapter 6). Furthermore, several judicial opinions (reviewed in “Constitutionality of Regulating Tobacco Advertising,” later in this chapter) have questioned whether the enormous investment in advertising serves only brand loyalty. It has also been argued that a significant part of the expanding budget for tobacco marketing is for promotion to specific market segments (Hollie 1985). Other observers have suggested that marketing campaigns heavily target cultural and ethnic minorities through product development, packaging, pricing, and brand promotion (Warner et al. 1986; Ernster 1993).

Underlying these observations is awareness of a basic commercial principle: to continue to be successful, a product must not only retain consumers but also, over time, gain new consumers. Gaining new

consumers is necessarily of particular concern to the tobacco industry. Advocates for reducing tobacco use have pointed out that if the tobacco industry is to maintain current consumption or even slow the ongoing decline in smoking, the industry must aggressively seek replacement smokers for the estimated 3,500 Americans who quit smoking each day and for the additional 1,200 tobacco customers and former customers who die each day of smoking-related illnesses (CDC 1993b, 1997b).

The facts about uptake of tobacco use strongly suggest where the industry’s replacement smokers will come from. Epidemiologic studies show that nearly all first use of tobacco occurs before high school graduation (USDHHS 1994). Whether tobacco companies deliberately market their products to preadults is difficult to ascertain. Nonetheless, indirect evidence of the importance of advertising and promotion to the tobacco industry is provided by surveys that suggest that most adolescents can recall certain tobacco advertisements, logos, or brand insignia; these surveys correlate such recall with smoking intent, initiation, or level of consumption (Alexander et al. 1983; Goldstein et al. 1987; Pierce et al. 1991; Evans et al. 1995).

The American Medical Association (Utah Delegation 1989), together with a broad range of public health organizations, has called for stricter regulation of cigarette advertisements and even for a complete ban—resolutions that were reiterated in 1995 (American Medical Association House of Delegates 1995). Many public health and smoking prevention groups specifically seek government regulation to address what they consider discriminatory practices of tobacco manufacturers in targeting members of minority groups (Warner et al. 1986). These groups claim that advertisements overwhelm smoking prevention messages and increase the number of people who smoke each year beyond the number that would smoke if advertising and promotion affected only market share. Industry officials deny targeting and argue that because most of the population is now aware of the risks associated with tobacco products, citizens can make informed decisions for themselves. More important, the tobacco industry claims its First Amendment constitutional right to promote its products (Cotton 1990; Tollison and Wagner 1992; see the discussion in “Constitutionality of Regulating Tobacco Advertising,” later in this chapter).

Such arguments and counterarguments have been at the heart of a 30-year endeavor to regulate advertising and promotion in the tobacco industry. A review of this effort, with some specific examples from the United States and other countries, provides insight

into the strengths and weaknesses of both sides of the argument and suggests several areas for policy development.

Attempts to Regulate Tobacco Advertising and Packaging

Regulatory efforts to restrict the advertising and promotion of cigarettes were among the earliest responses to the 1964 landmark report of the Surgeon General's Advisory Committee, which set forth overwhelming scientific evidence on the health hazards of cigarette smoking. A week after the January 11, 1964, release of the report, the FTC filed a Notice of Rule-Making Proceeding (January 17, 1964) that appeared in the January 22, 1964, *Federal Register*. The notice set forth the agency's tentative views of how the requirements of the Federal Trade Commission Act (Public Law 96-252) would apply to the advertising and labeling of cigarettes in light of the Advisory Committee's report (*Federal Register* 1964). In a pertinent part, section 5 of the Federal Trade Commission Act states that "unfair or deceptive acts or practices [are] declared unlawful" and that the commission has the power to proceed against them as an administrative agency.

In its notice of rulemaking, the FTC stated its concern with "two ways in which cigarette advertising may be unlawfully misrepresenting or concealing the health hazards of smoking. First, the Commission has reason to believe that many current advertisements falsely state, or give the false impression, that cigarette smoking promotes health or physical well-being or is not a health hazard, or that smoking the advertised brand is less of a health hazard than smoking other brands of cigarettes" (*Federal Register* 1964, p. 530). The FTC also stated that much cigarette advertising then current portrayed cigarette smoking as pleasurable, desirable, compatible with physical fitness, or indispensable to full personal development and social success—all without informing the consumer of the health hazards of cigarette smoking.

The FTC posited that the dangers to health from cigarette smoking are so serious that knowledge and appreciation of them would be a material factor in influencing a person's decision to smoke cigarettes or to smoke a particular brand. (This point is considered in detail in "Tobacco Packaging and Informed Choice," later in this chapter.) Affirmative disclosures of these health hazards might thus be necessary in cigarette advertising that could cloud or obscure public consciousness of these health hazards. After receiving

written comments and materials from interested parties and after conducting hearings in March 1964 on the proposed rule (see the text box "Response From the Tobacco Industry—1964"), the FTC issued on June 22, 1964, the "Statement of Basis and Purpose" regarding its proposed Trade Regulation Rule. (A Trade Regulation Rule is, in effect, an administrative statute with the force of law.) In this document, the commission announced that it would require warnings on cigarette packages and in advertisements for cigarettes that cigarette smoking is dangerous to human health.

Cigarette Warning Labels

After participating in hearings before the U.S. House of Representatives Committee on Interstate and Foreign Commerce on cigarette labeling and FTC rules, the commission postponed until 1965 the implementation of any Trade Regulation Rule. In that year, the Federal Cigarette Labeling and Advertising Act of 1965 (Public Law 89-92) required that the warning "Caution: Cigarette Smoking May Be Hazardous to Your Health" (Federal Cigarette Labeling and Advertising Act, sec. 4) be placed in small print on one of the side panels of each cigarette package. The act permitted no additional labeling requirement under any federal, state, or local law, thus effectively preempting any other health messages on cigarette packages. The act also suspended for three years the FTC's authority to require health warnings on cigarette advertising.

This preemption was strongly opposed in the minority view of Representative John E. Moss (D-CA), who presented the argument as follows:

I most strongly object to sections 6 and 7 of this bill. Section 6 would prevent the Federal Trade Commission, the Food and Drug Administration, and the U.S. Public Health Service in administering their respective laws from imposing any additional requirement with regard to the labeling of cigarettes involving a health warning. The bill would also preclude State and local health authorities from imposing such requirements.

Section 7, the preemption provision of the bill, provides that no cautionary statement with respect to smoking and health other than specified in this legislation shall be required on any package; and that no such statement with respect to smoking and health shall be required in advertising for cigarettes packaged in conformity with the labeling provisions of this legislation.

The Secretary of Health, Education, and Welfare has said that preventing any regulatory agency from imposing a label warning requirement other than that prescribed in the bill is "a position which we consider too inflexible."

The National Interagency Council on Smoking and Health submitted a petition to the committee asking us "not to approve any legislation which will prevent the Federal Trade Commission from carrying out its reaffirmed intention of requiring health warnings in cigarette advertising" (Moss 1965, pp. 2365-6).

Representative Moss concluded his minority report with a strong condemnation:

In summary, I am strongly opposed to those features of this legislation which would preclude the imposition of more stringent labeling requirements or the imposition of health warnings in advertisements which Federal, State, or local health authorities may deem necessary in the future in the proper exercise of their respective powers. We must face the facts as presented to us by the Surgeon General, American Cancer Society, American Medical Association, American Heart Association, and the

National Tuberculosis Association. We must first concern ourselves with public health and welfare, not legislate to the whims of a special interest (Moss 1965, p. 2367).

In commenting on the 1965 labeling law, the Secretary of the Department of Health, Education, and Welfare outlined an alternative view of effective health warnings on cigarette packages (Celebrezze 1965). Secretary Anthony J. Celebrezze recommended that the warning appear in large type on the main faces of the package. He commented:

The statute should require the warning to be prominent and conspicuous but should leave the precise location and size of the warning on the label, and related matters, to regulation in the light of the expertise and experience of the regulatory agency. . . . [Ten]-point type, which is 2 points smaller than the type size used in typing this letter, is hardly calculated to invite the consumer's attention. . . .

If the required warning is in effect negated or disclaimed on the label or in accompanying literature by words, statements, designs, or other graphic material, the warning requirement shall be deemed

Response From the Tobacco Industry—1964

In April 1964, in rapid response to the Surgeon General's report, the tobacco industry published a voluntary code for advertising and marketing practices (Gray 1964). The stated purpose of the code was "to establish uniform standards for cigarette advertising and to provide means whereby compliance with this code can be ascertained promptly and fairly and on a consistent basis" (p. 141). The code was designed to restrict cigarette advertisements aimed at young people, to limit implied or direct health claims to those that could be medically and scientifically proved, and to curb the so-called virility theme in cigarette advertisements. The code specifically prohibited advertising that suggested that cigarette smoking was essential to "sexual attraction," "success," sophistication, athletic abilities, physical stamina, and "social prominence" (p. 143)—images that the industry recognized as influencing smoking by young people.

At hearings before the House Interstate and Foreign Commerce Committee on June 25, 1964, Bowman Gray, Chairman of the Board of R.J. Reynolds Tobacco Company, speaking on behalf of the industry, told Congress, "This advertising code represents a sincere effort by the industry to respond to criticism of the industry's advertising which has been voiced in some quarters. It is an earnest effort at industry self-regulation. I hope the industry will be given reasonable opportunity to implement this code" (Gray 1964, p. 141).

The code was to be enforced by an independent administrator. All advertisements were to be precleared, and violations of the code were subject to a fine of \$100,000. Enforcement provisions of the code were dropped shortly after passage of the Federal Cigarette Labeling and Advertising Act in 1965.

not to have been met. . . . [Congress should consider giving the department] specific authority to prohibit or regulate the use of statements that while not clearly negating the warning and while literally true or at least not demonstrably false, may give the consumer the misleading impression that a given cigarette is safer than others (Celebrezze 1965, p. 2359).

These recommendations predate by three decades similar implementation of warnings in other countries (described in "Examples of Product Labeling in Other Countries," later in this chapter); such an approach, however, has not been taken in this country.

The 1965 law also required that the FTC annually transmit to Congress a report on the effectiveness of cigarette labeling, on current cigarette advertising and promotion practices, and on recommendations for legislation. In June 1967, in its first report to Congress, the FTC recommended that the package label be changed to "Warning: Cigarette Smoking Is Dangerous to Health and May Cause Death from Cancer and Other Diseases" (FTC 1967, p. 30).

Broadcast Advertising Ban

In 1969 Congress passed the Public Health Cigarette Smoking Act (Public Law 91-222), which prohibited cigarette advertising on all media subject to Federal Communications Commission (FCC) regulation, especially radio and television broadcasting, and required that each cigarette package contain the label "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health" (Public Health Cigarette Smoking Act, sec. 4). This new law also preempted any other health warning requirements for cigarette packages. The prohibition on broadcast media advertising became effective on January 2, 1971. The FTC issued complaints against the cigarette companies that eventually led to a consent decree requiring the companies to add the statutory label warning to their advertising in magazines, newspapers, and outdoor displays (*Trade Regulation Reporter* 1973).

The prohibition on television and radio advertising was challenged—not by the cigarette companies, but by a group of broadcasters—in *Capital Broadcasting Co. v. Mitchell* (333 F. Supp. 582 [D.D.C. 1971]). That case upheld the constitutionality of the congressional prohibition by a 2 to 1 vote. Despite this victory, a sobering note was struck in the dissenting opinion of Judge J. Skelly Wright. Far from casting his vote against smoking prevention, Judge Wright was concerned that

upholding the act, and thus upholding the prohibition on broadcast advertising, would actually aid the tobacco industry. His reasoning—which proved correct—was that the ban would put an end not only to tobacco advertising but also to the cost-free counteradvertising that had been running in the electronic media since 1969, when the FCC's Fairness Doctrine was first held applicable to cigarette advertising.

The Fairness Doctrine, which was put forth in 1949 (and ceased applying to tobacco in 1971 after cigarette advertising on radio and television ended), required that whenever material covering "a controversial issue of public importance" (*Banzhaf v. FCC*, 405 F.2d 1082, 1086 [D.C. Cir. 1968], *cert. denied*, 396 U.S. 842, 90 S. Ct. 50 [1969]) was aired, the broadcaster had an obligation to present, to some degree, both sides of the issue. Although the Fairness Doctrine had not previously been interpreted to apply to advertising, in *Banzhaf* the Federal Circuit Court of Appeals ruled that the FCC had the authority, through the Fairness Doctrine, to require that radio and television stations carrying cigarette advertising devote (i.e., without charging advertising fees) a significant amount of broadcast time to presenting the case against smoking. (For more on the plaintiff, John F. Banzhaf, see "The Attack on Advertising" in Chapter 2.) In the court's ruling, Chief Judge David Bazelon observed that "if we are to adopt [the tobacco industry's] analysis [of Congress' intention in enacting the Federal Cigarette Labeling and Advertising Act], we must conclude that Congress legislated to curtail the potential flow of information lest the public learn too much about the hazards of smoking for the good of the tobacco industry and the economy. We are loathe to impute such a purpose to Congress absent a clear expression" (*Banzhaf*, p. 1089).

However, three years later, in *Capital Broadcasting Co. v. Acting Attorney General* (405 U.S. 1000 [1972], *aff'd sub nom. Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 [D.D.C. 1971]), it was Judge Wright's view that the television and radio counteradvertising that had arisen from the Fairness Doctrine was so effective that the tobacco companies actually favored the challenged ban. There is some support for this view. Per capita cigarette consumption in the United States, which had declined (with some fluctuation) generally since the 1964 report to the Surgeon General on the health effects of smoking, had leveled off and then increased after cigarette advertising was removed in 1971 from radio and television. Some analysts have asserted that these changes indicate that the cost-free counteradvertisements opposing cigarette use, which along with the commercials promoting cigarettes,

largely disappeared from the airwaves except for a relatively few public service announcements, were more effective in discouraging consumption than cigarette commercials were in encouraging consumption (Warner 1979). Moreover, the prohibition of cigarette advertising on broadcast stations has allowed the tobacco companies to avoid the significant expense of advertising on national television and to devote their promotional dollars to other media.

A Midcourse Assessment

A decade after the broadcast ban, the FTC issued a staff report in May 1981 on cigarette advertising (Myers et al. 1981). This report asserted that "the dominant themes of cigarette advertising are that smoking is associated with youthful vigor, good health, good looks and personal, social and professional acceptance and success, and that it is compatible with a wide range of athletic and healthful activities" (p. 2-13). Although such advertising included the required general warning about the health hazards of cigarette smoking and listed the cigarette's tar and nicotine contents (as determined by FTC testing methods), the advertisements otherwise made no mention of the adverse health consequences of smoking cigarettes. The overriding message of cigarette advertising was thus that smoking is a positive, desirable experience.

Details from a nonpublic version of the FTC report revealed, for example, that a primary theme for the marketing of Salem cigarettes was the association of the cigarette with the lifestyle of young adult males who were (in the words of the company's campaign notes) "masculine, contemporary, confident, self-assured, daring/adventurous, mature" (Banzhaf 1982, p. 260). The report quoted from a Doral cigarette campaign that sought to project the image of "an independent, self-reliant, self-confident, take-charge kind of person" (p. 260) and a campaign that depicted a "Winston man" as "a man's man who is strong, vigorous, confident, experienced, mature" (p. 260). Taking another tack, the Eve cigarette campaign sought to portray the smoker as a "sophisticated, up-to-date, youthful and active woman who seems to have distinct ideas about what she wants" (p. 261). The campaign for the Lark brand was designed to position it as a "youthful, contemporary brand that satisfies the lifestyles of the modern smoking public" (p. 260) and emphasizes "moments of post-tension and relaxation" (pp. 260-1).

The nonpublic version of the FTC report also detailed and quoted from the conclusion of a marketing and research firm that had conducted focus group

interviews to help Ted Bates and Company, Inc., develop a marketable image for Viceroy cigarettes. The report, summarizing the results of the research, asserted that many smokers perceived the smoking habit as a dirty and dangerous one engaged in only by "very stupid people" (Banzhaf 1982, p. 262). The report concluded: "Thus, the smokers have to face the fact that they are illogical, irrational and stupid. People find it hard to go throughout life with such negative presentation and evaluation of self. The saviors are the rationalization and repression that end up and result in a defense mechanism that, as many of the defense mechanisms we use, has its own logic, its own rationale" (p. 262).

This marketing analysis went on to state that because there "are not any real, absolute, positive qualities or attributes in a cigarette" (Banzhaf 1982, p. 262), the most effective advertising is designed to "reduce objections" (p. 262) to the product by presenting a picture or situation ambiguous enough to provide smokers with a rationale for their behavior and a means of repressing their health concerns about smoking. The advertisement must thus project the image that cigarettes have clearly beneficial functions, such as improving the smoker's self-image and self-acceptance or serving as a stimulant or tranquilizer that offers an acceptable means of self-reward. Accordingly, the analysis recommended that advertisers should start from "the basic assumption that cigarette smoking is dangerous to your health" (p. 263) and then try to circumvent the problem rather than fight what would be a losing battle.

A particularly notable element of the report was how to persuade young people to smoke:

For the young smoker, the cigarette is not yet an integral part of life, of day-to-day life, in spite of the fact that [young smokers] try to project the image of a regular, run-of-the-mill smoker. For them, a cigarette, and the whole smoking process, is part of the illicit pleasure category. . . . In the young smoker's mind a cigarette falls into the same category with wine, beer, shaving, wearing a bra (or *purposely* not wearing one), declaration of independence and striving for self-identity. For the young starter, a cigarette is associated with introduction to sex life, with courtship, with smoking "pot" and keeping late studying hours (Banzhaf 1982, p. 263).

The survey then recommended a strategy for attracting young people to start cigarette smoking: present the cigarette as one of a few initiations into the adult world and show the cigarette as part of the illicit pleasure category of products and activities. To the

degree possible under legal constraints, the strategy advised relating the pleasure of smoking cigarettes to the pleasures of adult or illicit activities, such as drinking alcohol, smoking marijuana, or having sex (Myers et al. 1981). Brown & Williamson Tobacco Corporation stated that these proposals were never implemented and did not represent their policy.

In sum, the marketing and research firm recommended that successful cigarette advertising must either consciously or unconsciously deal with smoking and health issues by repressing the health concerns of the consumers of the product and providing a rationalization for consumption. The 1981 FTC report also concluded that the federally mandated health warning had little impact on the public's level of knowledge and attitudes about smoking. The report further observed that the warning was outworn, abstract, difficult to remember, and not perceived as personally relevant (Myers et al. 1981). These concerns contributed to Congress' enactment of the Comprehensive Smoking Education Act of 1984 (Public Law 98-474), which required four specific, rotating health warnings on all cigarette packages and advertisements (Comprehensive Smoking Education Act, sec. 4):

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

SURGEON GENERAL'S WARNING: Smoking by Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

The Comprehensive Smoking Education Act of 1984 thus amended the Federal Cigarette Labeling and Advertising Act and required warnings to be placed on advertisements as well as on cigarette packages. The act preempts state and federal attempts to place additional warnings on packages, but it preempts only state action with regard to advertising. The FTC retains such jurisdiction under section 5.

From the first, the exact appearance of warning labels (wording, layout, and positioning on packages and advertisements) has represented compromises between the recommendations of the FTC and smoking prevention advocates and those of the tobacco

industry. In 1969, for example, the FTC recommended a warning on cigarette packages that specifically mentioned death, cancer, heart disease, chronic bronchitis, and emphysema. The resulting legislation required the legend to provide the general warning only that smoking is "dangerous" to one's health (Public Health Cigarette Smoking Act of 1969, sec. 4). Similarly, in its 1981 report on cigarette advertising, the FTC recommended that new warning labels use a "circle-and-arrow" format that would be more effective than the traditional rectangular format, but Congress did not take this approach in the Comprehensive Smoking Education Act of 1984. Also, the new labels did not incorporate the FTC's recommendations to contain specific references to addiction, miscarriage, and death and to disclose the brand's yields of tar, nicotine, and carbon monoxide.

Smokeless Tobacco Warning Labels

Requirements for warning labels on smokeless tobacco products lagged behind those on cigarettes by more than 20 years. By the mid-1980s, the strong evidence that smokeless tobacco causes oral cancer, nicotine addiction, and other health problems and that its use was increasing among boys led Massachusetts to adopt legislation requiring warning labels on packages of snuff and caused 25 other states to consider similar legislation (USDHHS 1989).

The Massachusetts law was preempted, before it could take effect, by the federal Comprehensive Smokeless Tobacco Health Education Act of 1986 (Public Law 99-252). This law not only required three rotating warning labels on smokeless tobacco packaging and in all advertising (except billboards) but also stipulated that the labels have the circle-and-arrow format that the FTC had recommended earlier for cigarette warnings. The three rotating labels read as follows (Comprehensive Smokeless Tobacco Health Education Act of 1986, sec. 3):

WARNING: This product may cause mouth cancer.

WARNING: This product may cause gum disease and tooth loss.

WARNING: This product is not a safe alternative to cigarettes.

Initially, the FTC excluded utilitarian items—such as hats, T-shirts, lighters, and jackets—bearing the name or logo of smokeless tobacco products. A consortium

of Public Citizen and several prominent health organizations sued the FTC, arguing that this exclusion was contrary to the provisions of the act, which sought a comprehensive rather than a narrow use of health warnings (*Public Citizen v. Federal Trade Commission*, 869 F.2d 1541 [D.C. Cir. 1989]). The Court of Appeals for the District of Columbia ruled for the plaintiff, stating that the act was intended to cover utilitarian items, since those were among the smokeless tobacco industry's most effective means of promoting its products to adolescents. The court elaborated its point, saying that adolescents were less likely than adults to read magazines and newspapers and thereby less likely to encounter the mandated warnings there. Adolescents were also likely to have passed the critical moment of decision by the time they obtained the product itself and encountered its warning label. Accordingly, in 1991, the FTC issued a final rule requiring health warnings to be displayed on utilitarian items and providing for the manner in which the warnings were displayed.

All advertising of smokeless tobacco products is also banned on any medium of electronic communication subject to the jurisdiction of the FTC. Under this act, federal agencies and state and local governments are preempted from imposing additional health warnings on smokeless tobacco products and advertisements (except for billboards, which were excluded from this act). Furthermore, instead of stipulating where the labels must be positioned, the act required only "conspicuous and prominent" placement (Comprehensive Smokeless Tobacco Health Education Act of 1986, sec. 3). Implementation was left to the FTC, which enacted enabling regulations on November 4, 1994.

Regulation of Tobacco Packaging

Package size of tobacco products has been another area of public health concern and action. Evidence that levels of tobacco consumption reflect the affordability of tobacco products (see Chapter 6) has raised concern about selling cigarettes in packs containing fewer than the usual 20 cigarettes. In many countries, cigarettes are sold in packages of 15, 10, or 5 cigarettes. These smaller package formats have been dubbed "kiddie" packs in Canada by smoking prevention activists (Chrétien 1994). Research has shown that young people account for many sales of smaller cigarette packages (Wilson et al. 1987; Nova Scotia Council on Smoking and Health 1991; IMPACT Research 1993), probably because of their low price and ease of concealment.

These findings have led some jurisdictions to prohibit the marketing of packages containing fewer than 20 cigarettes. An Australian state legislature has also passed such a ban (the Western Australia Tobacco Control Act of 1990). In Canada, several provinces have banned small package sizes, and the revised federal Tobacco Sales to Young Persons Act of 1993 nationally banned packages of fewer than 20 cigarettes.

Another issue of concern regarding tobacco packaging is the use of potentially misleading descriptive words in the labeling of some tobacco products (Davis et al. 1990). A recent Gallup poll found that words such as "slim," "low tar," and "light" conveyed messages viewed as healthful (Gallup Organization, Inc. 1993, pp. 23, 25). Cohen (1992) reported that tobacco companies have long known that their customers equate the marketing term "low tar" (p. 85) with health benefits. Chapman and colleagues (1986) reported that smokers tend to systematically underestimate the actual tar deliveries of their particular brands, and Gori (1990) found that one-half of smokers interviewed in the United States and Europe assume that the lower the tar rating, the lower the brand's propensity to cause disease. The Coalition on Smoking OR Health (1988) has further analyzed how promoting cigarette brands as having low tar and low nicotine content communicates a message to consumers that these brands have health benefits.

The use of such descriptive words in cigarette brand names has been called into question because variations in the way cigarettes are actually smoked may mean that the actual yield of toxic constituents from cigarettes differs from the levels determined by currently accepted testing procedures (Henningfield et al. 1994; see "Compensatory Smoking," later in this chapter). For example, smokers of reduced-tar cigarettes may (deliberately or not) inhale harder to draw more smoke through the denser filter and deep into the lungs and may smoke the cigarette down closer to the filter, thereby inhaling greater concentrations of toxins. This concern led to the appointment of an ad hoc committee of the President's Cancer Panel of the National Cancer Institute (NCI) to evaluate the current FTC protocol for testing tar, nicotine, and carbon monoxide. One of the conclusions of this panel was that "brand names and brand classifications such as 'light' and 'ultra light' represent health claims and should be regulated and accompanied, in fair balance, with an appropriate disclaimer" (NCI 1996, p. vii). This recommendation has not yet been carried out.

A further aspect of tobacco packaging that is currently receiving significant attention, although primarily outside the United States, is the possibility of

legislated plain (or “generic”) packaging for tobacco products. This initiative is partly motivated by the belief that removing much of the brand image of tobacco products would not only make the product less attractive but also weaken the connection with—and thus lessen the effect of—visual and verbal image-linked efforts to promote particular brands (Mahood 1995). There is evidence that young people find plain packaging less attractive (Beede and Lawson 1992; Centre for Health Promotion 1993) and that plain packaging makes health messages more noticeable (Centre for Behavioural Research in Cancer 1992). In Canada, the federal government has considered using plain packaging for tobacco products (Standing Committee on Health 1994; Health Canada 1995b), and the province of Ontario, in enacting the Tobacco Products Control Act in 1994, authorized the requirement for plain packaging on all cigarettes sold in Ontario. Such packaging reforms have not yet been enacted in any jurisdiction.

Examples of Product Labeling in Other Countries

In recent years, many countries have taken significant action on specifying packaging and warning labels for tobacco products. All countries of the European Union must comply with a May 15, 1992, directive (Council Directive 92/41/EEC 1992 O.J. [L 158]) that requires stipulated health warnings on each of the main package panels. In Thailand, pursuant to its Tobacco Products Control Act, which was based on principles developed in Canadian regulations (discussed later in this section), prominent black-and-white health messages are required on the front of the package. South Africa and New Zealand require detailed health messages on the main package panels; the messages are based largely on Australian packaging.

The messages appearing on Australian cigarette packages are based on the work of the Centre for Behavioural Research in Cancer (1992). These messages were required as of January 1, 1995, and were incorporated into a broad effort “to inform smokers of the long-term health effects of tobacco use” (Lawrence 1994, p. 1). The Australian system uses six rotating messages covering 25 percent of the front of the cigarette packets. One side of the packet is entirely given to the labeling of dangerous constituents, and all the labels must be in black and white. Thirty-three percent of the rear main packet panel must be covered by the same health message given on the front of the pack and followed by an elaboration of that message (Chapman 1995).

Of special interest are the package regulations currently in place in Canada. The Canadian health messages were established by regulatory power granted under the 1988 federal Tobacco Products Control Act, which came into effect on January 1, 1989. This legislation gives broad regulatory powers over tobacco product packaging. It also gives regulatory authority to require package inserts, although this power has not yet been acted on. By eventually delegating formulation of the precise warnings to administrative regulation, this legislation took the approach that had been recommended 25 years earlier by the U.S. Department of Health, Education, and Welfare (Celebrezze 1965; see also “Cigarette Warning Labels,” earlier in this chapter). This law also makes clear that the various provinces of Canada can require additional messages and that the provision of federal messages does not preempt other messages. The first set of regulations following this law required that four specific rotating health messages be placed on the two main panels of cigarette packages and be printed in a large typeface; this set of regulations stipulated that the messages must be “prominently displayed in contrasting colours” (Department of National Health and Welfare 1989, p. 64) and cover at least 20 percent of the panel face.

When the mandated Canadian health messages started appearing on tobacco products in 1989, it was clear to many public health workers that the language of the regulations had left the tobacco companies too much room for interpretation and had resulted in less prominence and contrast than the regulations had intended. Minister of National Health and Welfare Henry Perrin Beatty commented, “It’s very clear that, when you look at [the health warning on cigarette packs], it’s not designed to stand out. If our experts [at the Department of National Defence] knew as much about camouflage as the tobacco company did, nobody’d ever find our fellows” (*Spectator* 1989). This situation gained more attention when it was revealed that a prominent tobacco lobbyist had apparently influenced development of the regulations (Fraser 1989). Health advocates subsequently campaigned to attain more prominent messages through revising the regulations (Mahood 1995).

New legislation was enacted on August 11, 1993 (Department of National Health and Welfare 1993), and all packaging for tobacco products destined for sale in Canada had to comply by September 11, 1994. Among these precedent-setting regulations (Mahood 1995) were the following requirements:

- The message must cover at least 25 percent of the top of each main panel.

- The message must be framed by a stipulated border (on many packs, this border yields a total message area that uses over 40 percent of the surface).
- Each of eight rotating messages must be presented one-half of the time in black on a white background with a black border. The other one-half of the time, the messages must be white on a black background surrounded by a white border.
- One entire side panel must be used to present information on the toxic constituents.
- Every side panel of tobacco cartons must display a black-on-white message covering 25 percent of the panel area and stating "Cigarettes are addictive and cause lung cancer, emphysema, and heart disease" (Department of National Health and Welfare 1993, p. 3278).
- The message must bear no attributions.

One ironic result of these requirements was that cigarettes manufactured in the United States for the Canadian market were produced, albeit only for export, with health messages that conform with the recommendations provided in 1965 by the U.S. Department of Health, Education, and Welfare.

The Canadian regulations were reversed in 1995, when the Supreme Court of Canada held that the country's complete ban on overt tobacco advertisements (another key component of the 1993 regulations) and its requirement of unattributed health warnings on packages were in violation of the tobacco industry's freedom of expression and the *Canadian Charter of Rights and Freedoms* (*RJR-MacDonald Inc. v. Attorney General of Canada*, File Nos. 23460, 23490 [Can. Nov. 29–30, 1994, Sept. 21, 1995], cited in 10.6 TPLR 2.167 [1995]). These central elements of Canada's Tobacco Products Control Act fell because the Canadian government did not meet its constitutional obligation of proving that the approach taken was the least drastic means of achieving a public health objective. These narrow evidentiary grounds on which the decision was made left room for the Canadian government to counter. The government offered a new proposal, called *Tobacco Control: A Blueprint to Protect the Health of Canadians*, that reinstated the advertising ban, imposed restrictions on brand-name promotion and sponsorship, instituted controls over packaging and labeling, and increased product regulation and reporting requirements.

In creating a new legal framework, the Canadian government would make tobacco a *de facto* illegal product whose sale could be permitted but would be

subject to specific conditions. This reversal of the burden of proof gives constitutional allowance to the advertising restrictions in Canada. Following the unveiling of the *Blueprint*, the tobacco industry brought forward a voluntary proposal to restrict advertising. Subsequent resumption of advertising has been controversial, and the industry has been accused of breaching its own code (LeGresley 1996).

Tobacco Advertising, Commercial Speech, and the First Amendment

Regulation of tobacco advertising in the United States is legally problematic. Although protections afforded by the First Amendment to the U.S. Constitution may be modified for commercial speech, including advertising, such modification is an area of intensive legal debate. The two decades of lawsuits described in this section make it clear that a concerted and persistent government interest is essential if such restriction of free speech is to be upheld in courts. To satisfy legal scrutiny, the government's efforts must clearly show that any restrictions directly and materially advance its asserted interest—protecting the health of the American people.

The United States Supreme Court has defined commercial speech as "expression related solely to the economic interests of the speaker and its audience" (*Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 U.S. 557 [1980]). Commercial speech thus includes advertisements by cigarette manufacturers that invite consumers to buy their product. As the Supreme Court has observed, "For most of this Nation's history, purely commercial advertising was not considered to implicate the constitutional protection of the First Amendment" (*United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2703 [1993]). Restrictions on commercial speech were viewed as being similar to economic regulation and were routinely upheld. A midcentury example key to later efforts to restrict tobacco advertising occurred when the Supreme Court, in *Valentine v. Chrestensen* (316 U.S. 52 [2d Cir. 1942], *rev'd*), held that the state could prohibit the street distribution of handbills containing commercial advertising matter (see also *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 [1980]). Such precedents enabled the courts to uphold the 1972 congressional ban on tobacco advertising on radio and television (*Capital Broadcasting Co.*, 405 U.S. 1000). Subsequent legal scrutiny, however, has acted to reverse this trend.

Constitutionality of Regulating Advertising

In 1975, the United States Supreme Court held for the first time that commercial advertising in general was entitled to protection under the First Amendment. In *Bigelow v. Virginia* (421 U.S. 809 [1975]), the Court struck down a state statute banning commercial advertisements for abortion referral services. The Court found that "the relationship of speech to the marketplace of products or services does not make [commercial advertising] valueless in the marketplace of ideas" (p. 826). However, the Court emphasized that it was defending not merely commercial speech, but speech that contained "material of clear 'public interest'" (p. 822).

The Court also defended commercial speech in a case involving advertising of the price of pharmaceuticals. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (425 U.S. 748 [1976]), the Court found that the constitutional protection afforded to advertisements of the price of pharmaceuticals was shared by advertisers and recipients of the information. The Court noted the importance of information to consumers: "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate" (p. 763). The Court pointed out that advertising is disseminating information to the consumer about who is producing the product, for what reason, and at what price, even if it does not "editorialize on any subject, cultural, philosophical, or political" (p. 761).

In that same ruling, however, the Supreme Court emphasized that commercial speech would not be afforded the same level of protection as other forms of speech and therefore that the state can regulate advertising if such regulation is in conformity to a valid public interest. These interests include avoiding deceptive and misleading claims; preventing unlawful activities, such as the sale of alcoholic beverages to minors; and protecting public health. "The First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely" (*Virginia State Board of Pharmacy*, pp. 771–2).

Most cases involving regulated advertising are assessed through a four-pronged test to determine whether the regulations violate the First Amendment. This test was set forth in *Central Hudson* (447 U.S. 557). First, the speech being suppressed must have forfeited its First Amendment protection by being unlawful or deceptive or fraudulent: "The First Amendment's

concern for commercial speech is based on the informational function of advertising. . . . Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it" (p. 563). Second, the government must assert a substantial interest in regulating the speech. Third, regulating commercial speech must directly and materially benefit this government interest. Fourth, the government must show that the means chosen to benefit its interest are no more extensive than necessary. (This four-pronged test is discussed more fully in "Constitutionality of Regulating Tobacco Advertising," later in this chapter.)

The level of deference the Supreme Court gives to legislatures in meeting these four requirements seems to vary. In some cases, the Court defers to the legislative judgment that the speech restriction will be effective (*Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328 [1986]; *Edge Broadcasting*), while in other cases the Court demands more empirical support for the legislature's assumptions and conclusions (*Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S. Ct. 1585 [1995]; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495 [1996]).

In *Posadas de Puerto Rico*, the Supreme Court upheld a statute that prohibited advertising legal gambling casinos to residents. The Court found that even though nonfraudulent advertising that concerned a legal activity deserved First Amendment protection, the commonwealth's legislature could take steps to regulate it. The government has a substantial interest in protecting the health, safety, and welfare of its citizens, and this interest includes reducing the demand for gambling among residents through the regulation of advertising. The Court accepted the argument by the commonwealth that resident gambling would disrupt moral and cultural patterns, cause an increase in crime, foster prostitution, and develop corruption. In *Board of Trustees of the State University of New York v. Fox* (492 U.S. 469 [1989]) (also known as *Fox III*), the Court deferred to the legislature and refused to set aside a State University of New York statute that prohibited private commercial enterprises from operating on campus. In *Edge Broadcasting* (113 S. Ct. 2696), the Court upheld a federal statute that prohibited the broadcast of lottery advertisements generally but permitted advertisements of state-run lotteries on stations licensed to a state that conducts lotteries. The Court held that "the State [has] 'a strong interest in adopting and enforcing rules of conduct designed to protect the public'" (p. 2706). Citing *Fox III* with approval, the

Court said, "Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments" (p. 2707).

In contrast, in 44 *Liquormart*, the Supreme Court looked closely at the logic of the Rhode Island government in the ban it imposed on liquor price advertising. The Court considered that the Rhode Island restriction was a total prohibition and that there was too weak a connection between banning speech regarding prices and the state's assertion that this restriction would reduce liquor consumption. Furthermore, the Court was aware of the concern that the legislature had been captured by one group of economic competitors (small liquor stores that could not otherwise compete in price wars) and that the law was then drafted at the expense of the disfavored economic competitor (larger liquor chains). In the 44 *Liquormart* decision citing the dissent in *Rhode Island Liquor Stores Association v. Evening Call Pub. Co.* (497 A.2d 331 [R.I. 1985]), it was "suggested that the advertising ban was motivated, at least in part, by an interest in protecting small retailers from price competition" (p. 491, FN4).

In *Coors Brewing Co.*, the Supreme Court struck down a regulation restricting the printing of alcohol strength on beer labels. The Court found that the restriction did little to advance the government interest in preventing "strength wars" between competing beer manufacturers, particularly when other types of alcohol were required to list the alcohol potency on their labels. Finding that the speech restriction lacked a logical foundation, the Court viewed the regulation skeptically.

The pattern that emerges from these legal judgments is that where a law restricting commercial speech has a solid grounding in logic and empirical data, the Court will uphold it. If the regulatory system has a faulty connection between its goal and its method, the law will fail the third prong of the *Central Hudson* test and be struck down. In 44 *Liquormart*, Justice John Paul Stevens' plurality opinion required that the social science evidence supporting the legislative rationale directly and materially tie the government's goal (reducing liquor consumption) to its methodology (restricting liquor price advertising); the government failed to meet this legal requirement. Furthermore, the Court views harshly laws that impose a total ban on speech and thus paternalistically deprive consumers of information because the government perceives that the ban is "for their own good."

Constitutionality of Regulating Tobacco Advertising

Government regulations of tobacco product advertising can withstand legal scrutiny if they are carefully crafted and are not overbroad (*Edge Broadcasting*, p. 2705 [citing *Fox III*, p. 480]). Courts have found state and local regulations of tobacco advertising to be preempted by the Federal Cigarette Labeling and Advertising Act when they conclude that the regulation is based on "smoking and health." If the regulation is not preempted, then it must pass the four-pronged test advanced in *Central Hudson*. Reasonable regulations on tobacco advertising are likely to be upheld.

Preemption and the Federal Cigarette Labeling and Advertising Act

The Federal Cigarette Labeling and Advertising Act preempts a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter" (15 U.S.C. [United States Code] 1334[b]). In *Cipollone v. Liggett Group Inc.* (505 U.S. 504, 112 S. Ct. 2608 [1992]), the Supreme Court interpreted that language narrowly, allowing *Cipollone* to sue the tobacco industry if the claim were not based on a failure to warn about smoking and health issues in product advertising or promotion. The claim would not be preempted if it were based on more generalized state interests, such as preventing intentional fraud or enforcing manufacturer warranties. In *Mangini v. R.J. Reynolds Tobacco Co.* (22 Cal. App. 4th 628 [1993]), the California Court of Appeals restated the *Cipollone* holding by declaring that regulations are preempted only if they demand a "requirement or prohibition based on smoking and health. . . . imposed under State law with respect to. . . . advertising or promotion." If one of these elements is missing, the state law is not preempted.

State and local governments can still regulate tobacco advertising if they justify the law with a valid rationale not related to health. For example, Baltimore asserted that its ordinance restricting tobacco advertising on billboards was a reasonable and necessary measure for reducing illegal consumption of cigarettes by minors (*Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 862 F. Supp. 1402 [Md. 1994]). The city claimed that the focus of the ordinance was not on protecting the health of young people; the language of the ordinance was instead exclusively related to preventing youth from engaging in illegal transactions. (This assertion was made even though Baltimore does not criminalize youth purchase or

possession of tobacco products; Baltimore criminalizes the sale of tobacco to minors.) The district court accepted this stated intent of the ordinance. Even when legislators who supported the ordinance made certain health-related comments, the court discounted these as not necessarily being representative of the motives of the city council as a whole.

On appeal by the advertising company that was the plaintiff in the case, the Fourth Circuit Court of Appeals further held that the Baltimore ordinance was not preempted by the Federal Cigarette Labeling and Advertising Act because it did not relate to the content of advertising, but rather to billboard location (*Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318 [4th Cir. 1995]). The court interpreted the ordinance as a limited physical restriction in a limited media, for Baltimore allows such billboards in parts of the city zoned for commercial and industrial use. The court also observed that the Baltimore ordinance did not restrict tobacco industry advertising in other media, such as newspapers and magazines. State or local governments that cannot separate such ordinances from health-related issues, however, will have difficulty passing the preemption test. In Minnesota, for example, the court struck down a municipal statute that restricted tobacco advertising explicitly to protect health (*Chiglo v. City of Preston*, 909 F. Supp. 675 [D. Minn. 1995]).

The Four-Pronged Test

Is the Advertising Unlawful or Misleading?

A central justification for affording constitutional protection to advertising is the consumer's interest in the free flow of information (*Central Hudson*). Public health and smoking prevention groups often question whether attractive images that portray smoking as a socially acceptable, sexual, and athletic activity have any informational use to the consumer (Lowenstein 1988). Despite the emotive, noninformative character of cigarette advertising, the tobacco industry might argue that restricting such advertising should fail the first prong of the *Central Hudson* test because the product being advertised is lawful for adults and its promotion is not directly deceptive or fraudulent.

Certainly, advertisements that use images to connect health, vitality, and the good life with cigarette smoking distort the truth (Law 1992). Yet the United States Supreme Court's definition of "inherently misleading" refers to advertisements that promote fraud, represent overreaching, or create consumer confusion (*Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 462 [1978]). Proscriptions against misleading advertising have not

traditionally extended to "puffery" or imagery alone (*Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 [1985]). For example, courts have held that advertisements for alcoholic beverages that project images of drinkers as successful and fun-loving and do not warn of the dangers of alcohol abuse are not legally "misleading" (*Oklahoma Telecasters Association v. Crisp*, 699 F.2d 490, 500 [10th Cir. 1983], *rev'd on other grounds sub nom.; Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 [1984]). By analogy, courts may not find that promotions are directly misleading simply because they project images of smokers as glamorous people and do not mention the associated dangers of smoking.

A cigarette advertisement would be found to be misleading, however, if it included unsubstantiated health claims. Advertisements could not assert that cigarette smoking poses little or no risk to health or does not affect breathing. For example, the FTC challenged as false and misleading a newspaper advertisement (or advertorial), paid for by R.J. Reynolds Tobacco Company, that claimed smoking is not as hazardous to health as the public has been led to believe. Although the tobacco company initially stated that the statement was not commercial speech because it did not invite the public to purchase a particular product, the parties entered into a consent decree under which R.J. Reynolds agreed to stop the advertisement and to avoid future misrepresentation of scientific studies (*Bureau of National Affairs, Inc.* 1990).

Some proponents of restricting tobacco advertising argue that courts in the future could find the visual images projected in cigarette advertisements to be inherently deceptive or misleading. A legal opinion for the American Medical Association concluded, "Given what the cigarette advertising does portray, what it fails to say, and the vast public ignorance of the dangers and addictive quality of smoking, particularly among young persons, it is plain to us that this kind of advertising can be proscribed as deceptive or misleading" (Blasi and Monaghan 1986, p. 506). Analogously, the Supreme Court has construed the preemptive provisions of the cigarette labeling act to permit tort actions against cigarette manufacturers in the instance of fraudulent misrepresentation or conspiracy to misrepresent or conceal material facts (*Cipollone*).

Furthermore, to the extent that recent documents from the tobacco industry show that the industry purposefully marketed to minors, the courts may find this to be a deceptive advertising practice that leads to an illegal act. There is no constitutional speech protection for proposing illegal transactions, such as sales of cigarettes to minors. The tobacco company Liggett

Group Inc. has admitted that the entire tobacco industry conspired to market cigarettes to children (*Settlement Agreement Between Settling States and Brooke Group LTD, Liggett & Myers, Inc. and Liggett Group, Inc.*, cited in 13.1 TPLR 3.11 [1998]), and documents obtained in litigation from the other tobacco companies and recently made public confirm that tobacco companies have purposefully marketed to children as young as 14 years old (Coughlin et al. 1999). Regulation of some tobacco advertising may thus pass the first prong of the *Central Hudson* test (see the discussion of the *Mangini* case in "A Critical Example: Joe Camel," later in this chapter).

Is the Government's Interest Substantial?

Appellate courts have consistently found that states have a substantial interest in limiting tobacco advertisements (see, for example, *Penn Advertising; Oklahoma Telecasters*; and *Dunagin v. City of Oxford*, 718 F.2d 738 [5th Cir. 1983], cert. denied, 467 U.S. 1259 [1984]). Because of the strong epidemiologic evidence associating smoking with lung cancer, heart disease, and other causes of morbidity and mortality (USDHHS 1989), no court would deny that the federal government has a compelling interest in reducing smoking. As evidence mounts concerning the health hazards of environmental exposure to cigarette smoke (Environmental Protection Agency [EPA] 1992; Leary 1993; Reynolds 1993; Bero et al. 1994; California EPA 1997), the federal government may also exercise its police powers to protect nonsmokers.

The Federal Cigarette Labeling and Advertising Act preempts state and local governments from regulating cigarette advertising based on "smoking and health." Instead, as noted, many governments (such as those of Baltimore and New York City) are asserting an interest in preventing minors from being involved in illegal transactions. Additional nonhealth rationales include avoiding deceptive advertising and providing economic (as opposed to health-based) consumer protection.

Does the Regulation Directly Benefit the Public Interest?

The third prong of the *Central Hudson* test requires that governmental regulation of commercial speech must advance the government interest. The Supreme Court has not yet given clear direction as to what level of evidence is required to show that such regulation directly advances the government interest, but the Court is beginning to demand some scientific or statistical evidence of efficacy. In *Florida Bar v. Went For It, Inc.* (515 U.S. 618, 632 [1995]), the Court was satisfied with a general assertion by the state that common sense

dictated that restricting attorneys from advertising by direct mail would reduce ethical violations by attorneys and have a positive effect on the public's opinion of attorneys. Limited social science evidence was presented, yet the restriction was upheld. On the other hand, in 44 *Liquormart*, Justice Stevens' plurality opinion stated that one reason the Rhode Island statute was struck down was that the state had not produced evidence that its speech restriction would directly and materially produce the results desired to advance the government interest.

Even if the courts require empirical support of efficacy, tobacco advertising restrictions can still satisfy the third prong of the *Central Hudson* test. There is extensive social science research regarding the effect of tobacco advertising on the purchasing habits of teen smokers and on the positive imagery with which children regard and recognize tobacco advertising images. After R.J. Reynolds Tobacco Company introduced the Joe Camel advertising campaign in the late 1980s, the market share of Camel cigarettes among teenagers increased at least 20-fold; from the same point in time, the previous decline in overall teenage smoking prevalence was reversed (CDC 1994b). An association between a rise in young girls' smoking habits and the tobacco industry's decision to target marketing to adolescent girls has also been documented (Pierce et al. 1994a).

Some relevant legal judgments suggest that although the courts tend to require more than a commonsense assertion of the government's interest in restricting commercial speech, something less than empirical evidence may suffice. For example, although Justice Stevens in 44 *Liquormart* demanded empirical evidence, he also recognized there is "some room for the exercise of legislative judgment" (p. 508). The Supreme Court in *Edenfield v. Fane* (113 S. Ct. 1792 [1993]) suggested the need for a scientific validation of a connection between regulation and the achievement of a substantial state interest: the Court stated that the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree" (p. 1800).

In cases involving advertising restrictions for alcoholic beverages, the courts have consistently accepted—even in the absence of objective scientific studies—the reasonable legislative belief that such restrictions would lower consumption. The Tenth Circuit Court of Appeals found it not "constitutionally unreasonable for the State of Oklahoma to believe that advertising will not only increase sales of particular brands of alcoholic beverages but also of alcoholic beverages generally" (*Oklahoma Telecasters*, p. 501).

Similarly, the Ohio Supreme Court found that the advertising of drink prices would encourage and stimulate consumption of alcoholic beverages (*Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138, 142, 69 Ohio St. 2d 361 [Ohio 1982]). The advertising prohibition was thought to be closely connected to the state's interest in preventing consumption.

Courts have found a direct relationship between advertising and consumption or abuse in other dangerous products and activities (see, for example, *Williams v. Spencer*, 622 F.2d 1200 [4th Cir. 1980]; *Capital Broadcasting*). In *Central Hudson*, the Supreme Court found an immediate connection between advertising and the demand for electricity. The Court in *Métromedia, Inc. v. City of San Diego* (453 U.S. 490 [1981]) similarly found a link between billboard advertisements and traffic safety. The Court stated that this link is established by the "accumulated, common-sense judgments of local lawmakers" (p. 509).

Claims made on behalf of the tobacco and advertising industries that tobacco advertising is designed not to increase consumption but only to develop brand loyalty and gain an increased market share (Boddewyn 1989) may be unpersuasive to the courts (Chetwynd et al. 1989; Joossens 1989). Although some of the studies showing that advertising increases tobacco consumption have methodologies that are controversial—such as econometric (Lewit et al. 1981; Schneider et al. 1981; Seldon and Doroodian 1989), cross-cultural (Hamilton 1976; Reuijl 1982), and advertising recognition (Goldstein et al. 1987; DiFranza et al. 1991; Fischer et al. 1991a)—the courts would likely accept the legislature's reasonable belief that what the studies show is true. For example, the Ninth Circuit, in a 1997 opinion after *44 Liquormart*, maintained that "common sense suggests that advertising increases participation" (*Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1344 [9th Cir. 1997]). This portion of *Posadas de Puerto Rico* has survived *44 Liquormart*.

In an analogous situation, alcohol industry arguments against the relationship between advertising and consumption were rejected by the Fifth Circuit Court of Appeals, which held that Mississippi's ban on intra-state liquor advertising directly promoted the state's interests in the health and safety of its citizens. The court said that it did not "... believe that the liquor industry spends a billion dollars a year on advertising solely to acquire an added market share at the expense of competitors. ... we hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not 'concrete scientific evidence' exists to that effect" (*Dunagin*, p. 750). Because the tobacco industry spends six times as much as the

liquor industry on advertising and promotion (FTC 1995), because smoking remains the leading cause of avoidable death in America (McGinnis and Foege 1993), and because about 50 million Americans still smoke, even small reductions in smoking behavior—whether consumption or uptake—resulting from reduced advertising could achieve significant health benefits.

Cases trying to restrict alcohol advertising have also, however, set precedents that may stand in the way of comparable cases involving tobacco advertising. Most notably, in *44 Liquormart, Inc. v. Racine* (829 F. Supp. 543 [R.I. 1993]), the Rhode Island District Court judge found that the state's specific statute banning liquor price advertising had had "no significant impact on levels of alcohol consumption" (p. 549). Justice Stevens, in his plurality opinion, found that the statute could not survive without social science evidence because "speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends" (*44 Liquormart, Inc. v. Rhode Island*, p. 507).

Yet the Fourth Circuit Court of Appeals, the highest court to rule on tobacco advertising restrictions, has twice upheld Baltimore's limitation on tobacco advertising. The Fourth Circuit noted several differences between the liquor price advertising prohibition in *44 Liquormart, Inc. v. Rhode Island* and the limited restrictions in the Baltimore ordinance. *44 Liquormart* dealt with a total ban on speech directed to adults, whereas the Baltimore ordinance was a partial restriction of speech that targeted children as consumers of an adult product. The Fourth Circuit Court also held there was a close connection between the government's goal of preventing teen participation in illegal transactions and the limited speech restriction intended to support that goal (*Penn Advertising*, 63 F.3d 1318; *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 101 F.3d 332 [4th Cir. 1996]). By contrast, a notable reason for the Supreme Court's rejection of advertising restrictions in *44 Liquormart* was that the government had not proved a clear tie between its interest and the restrictions supposedly supporting that interest.

The Fourth Circuit reaffirmed its decision in *Penn Advertising* after the Supreme Court had asked it to review the decision in light of *44 Liquormart*. The Fourth Circuit specifically stated, "We have read the opinion in *44 Liquormart* and have considered its impact on the judgment in this case ... we conclude that *44 Liquormart* does not require us to change our decision" in this case (*Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 101 F.3d 332 [4th Cir. 1996], cert. denied, 117 S. Ct. 1569 [1997]).

Because a restriction like that upheld in *Penn Advertising* cannot constitutionally be a complete ban on all advertising of the product, some minors will be exposed to some level of adult tobacco advertising. This limit in scope does not constitute serious grounds for an appeal. A recent decision involving liquor regulation notes that the "Supreme Court has made it clear in the commercial speech context that underinclusiveness of regulation will not necessarily defeat a claim that a state interest has been materially advanced" (*Bad Frog Brewery, Inc. v. New York State Liquor Authority*, 134 F.3d 87, 99 [2d Cir. 1998]). In sum, the regulation need not cure all ills but it does need to advance the state interest in a demonstrably significant, rather than a small or otherwise circumstantial, way.

Is the Regulation of Advertising a Reasonable Fit?

The Supreme Court has made it clear that this standard is not to be confused with the "least restrictive means" test. In *Edge Broadcasting* (p. 2705), the Court said that the "requirement of narrow tailoring was met if 'the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation,' provided that it did not burden substantially more speech than necessary to further the government's legitimate interests." The existence of less restrictive methods of achieving the government's goals does not automatically defeat the legislation as it would in political speech cases. Instead the Court looks to see if the restriction does not sweep more broadly than necessary. In *Florida Bar* the Court stated,

In *Fox*, we made clear that the "least restrictive means" test has no role in the commercial speech context . . . "What our decisions require," instead, "is a 'fit' between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective" (citations omitted) (p. 632).

In practical terms, the decision implies that restrictions on tobacco advertising that target areas where children gather, such as schools and playgrounds, do not create a total ban, because the tobacco industry will still have many alternative channels to communicate with its adult customers. Adults can still receive information on price, quality, comparative product features, and any other information to help

them make an informed decision on tobacco products. Even if the tobacco industry were limited to communicating in tombstone format (black letters on a white background), the government would not have prohibited the flow of information.

For a similar reason, 44 *Liquormart, Inc. v. Rhode Island* does not change this analysis. The rationale the Supreme Court used there in overturning Rhode Island's alcohol advertising restriction—that the statute was a paternalistic ban on the free flow of truthful information—does not apply in tobacco advertising regulations like those upheld in *Penn Advertising*, because the tobacco industry would still have many avenues of communication open to it and could communicate all aspects of information.

Justice Stevens in 44 *Liquormart* also generally rejected a vice exception to commercial speech restrictions. In *Posadas de Puerto Rico*, the Court was willing to allow the legislature broad deference to curb speech that promoted "vice" activities such as gambling. Justice Stevens rejected this approach that allowed legislatures to ban speech rather than the vice itself. He stated, however, that "a 'vice' label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity" (44 *Liquormart, Inc. v. Rhode Island*, p. 514). In the case of restricting tobacco advertising aimed at children, the restriction matches the prohibition. It is illegal to sell tobacco products to minors, and therefore the legislature has a principled reason to prevent commercial speech in the limited area where it has already prohibited the commercial activity. This is in accord with Justice Clarence Thomas' view that a jurisdiction "may not restrict advertising regarding commercial transactions except to the extent that it outlaws or otherwise directly restricts the same transactions within its own borders" (p. 525).

In 44 *Liquormart*, Justice Sandra Day O'Connor's concurrence set out the guideposts she would use to judge commercial speech restrictions. "The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny. If alternative channels permit communication of the restricted speech, the regulation is more likely to be considered reasonable" (44 *Liquormart, Inc. v. Rhode Island*, pp. 529–30 [internal citations omitted]). The ruling presupposes that other less restrictive alternatives, such as price increases and access restrictions, have been tried (if enacted) and have not completely solved the problem. It is reasonable for a legislature

to conclude that limited restrictions on commercial speech aimed at youth must be a component of an overall plan to limit youth involvement with tobacco products. At the same time, the tobacco industry will have alternative channels to communicate to adults all the information in which adults are interested, including price, tar and nicotine levels, and taste. In the context of alcohol advertisements, courts have asserted that “the state’s concern is not that the public is unaware of the dangers of alcohol. . . . The concern instead is that advertising will unduly promote alcohol consumption despite known dangers” (*Dunagin, cert. denied*, 467 U.S. 1259).

The preceding review of relevant cases suggests that carefully designed, reasonable government restriction of cigarette advertising would likely meet the Supreme Court’s four criteria for restricting commercial speech and would therefore be found constitutional.

A Critical Example: Joe Camel

Perhaps the most discussed tobacco promotion of the 1990s—and one that brings together many of the issues discussed in the preceding section—is the advertising campaign for Camel cigarettes that features a cartoon camel character called Old Joe (often referred to as Joe Camel). Assertions have been made that this campaign improperly targeted minors, seeking to attract them to cigarette smoking. These concerns were heightened in the wake of the 1994 Surgeon General’s report on smoking and health, which focused on adolescents (USDHHS 1994). That report’s major conclusions included the following: those who smoke usually begin by age 18; most adolescent smokers become addicted to nicotine; tobacco addiction is associated with the later development of other drug addiction; tobacco use is related to psychosocial risk factors; and some cigarette advertising appears to be particularly effective on adolescents.

Critics argue that the cartoon character of Joe Camel, which has been used by R.J. Reynolds Tobacco Company in its advertising campaign for Camel cigarettes since 1988, has had substantial impact on smoking among underaged youth (DiFranza et al. 1991; Fischer et al. 1991a; Breo 1993; CDC 1994b). The character appears in print advertising and on promotional products disseminated by the company, such as mugs, matchbooks, store exit signs, and soft drink can holders. After a staff investigation, in 1994 the FTC declined, by a 3 to 2 vote, to issue a complaint charging that advertising using the Joe Camel character violated

section 5 of the Federal Trade Commission Act by inducing minors to smoke. Subsequently, the FTC did bring a complaint against R.J. Reynolds on May 28, 1997, alleging that “the purpose of the Joe Camel campaign was to reposition the Camel brand to make it attractive to younger smokers. . . . The Joe Camel campaign induced many of these children and adolescents under the age of 18 to smoke Camel cigarettes or increased the risk that they would do so. . . . R.J. Reynolds’ actions . . . have caused or were likely to cause substantial and ongoing injury to the health and safety of children and adolescents under the age of 18 that is not offset by any countervailing benefits and is not reasonably avoidable by these consumers” (*In re R.J. Reynolds Tobacco Co.*, Docket No. 9285 [FTC, May 28, 1997], cited in 12.3 TPLR 8.1, 8.2 [1997]). As late as the spring of 1998, Joe Camel memorabilia were still being offered for sale in R.J. Reynolds catalogs. The FTC ultimately dismissed its complaint as no longer necessary after the November 23, 1998, Master Settlement Agreement banned the use of all cartoon characters, including Joe Camel, in the advertising, promotion, packaging, and labeling of any tobacco product.

The Federal Trade Commission Act grants no private right of enforcement (*Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 [D.C. Cir. 1973]). However, the California Unfair Competition Law authorizes actions for injunctive relief (a measure sought to prevent a given course of action) not only by specified state and local officers but also by persons acting for the interest of themselves or the general public. A private action was brought in California state court by Janet Mangini, who asserted that R.J. Reynolds’ advertising practices in the Joe Camel campaign violated the Federal Trade Commission Act and the California statutory law of unfair competition (*Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal. 4th 1057, 875 P.2d 73 [Cal. 1994], cert. denied, 1994 U.S. LEXIS 8361 [Nov. 28, 1994]). Unfair competition is defined to include “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising” (California Business & Professions Code, sec. 17200). R.J. Reynolds, in contesting Mangini’s action, asserted that federal law preempted any action in the state courts. The Federal Cigarette Labeling and Advertising Act, as amended by the Public Health Cigarette Smoking Act of 1969, provides that “no requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provision of this Act” (Public Health Cigarette Smoking Act of 1969, sec. 5[b]).